APPENDIX A:

Opinion of the Supreme Court of Tennessee

JUDGMENT ENTERED

DATE: MAY 3 1982
Ramsey Leathers, Clerk

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

RECOMMENDED FOR PUBLICATION

MAY 3 1982

STATE OF TENNESSEE,)
APPELLEE)
)
VS.)
)
CECIL C. JOHNSON, JR.,)
APPELLANT)

DAVIDSON CRIMINAL

DOCKET NO. 81-16-I

HONORABLE A. A. BIRCH, JR., JUDGE

For Appellant:
J. Michael Engle
Nashville, Tennessee

Robert L. Smith
Nashville, Tennessee

For Appellee:
Kymberly Lynn Anne Hattaway
Assistant Attorney General

William M. Leech, Jr.
Attorney General & Reporter
Nashville, Tennessee

AFFIRMED

COOPER, JUSTICE

O P I N I O N

This case is before us on direct appeal by Cecil C. Johnson, Jr., from a judgment entered in the Circuit Court of Davidson County, Tennessee. See T.C.A. § 39-2406. The judgment approved the jury's verdicts finding appellant guilty of three counts of murder in the first degree, two counts of assault with intent to commit murder in the first degree, and two counts of robbery accomplished with the use of a deadly weapon. The sentence imposed on each murder conviction was death by electrocution. Appellant also was sentenced to serve four consecutive life terms on the assault with intent to commit murder in the first degree and robbery convictions. On review, we find no material error in the trial record and affirm the several convictions.

The crimes for which appellant stands convicted were committed on July 5, 1980. There is evidence that on that day, at about 9:45 p.m., appellant went to the convenience market on Twelfth Avenue South in Nashville, Tennessee, which was owned and operated by Bob Bell, Jr. Appellant pointed a gun at Mr. Bell and ordered him and Lewis Smith, who was in the store working on a boat motor at the request of Mr. Bell, to go behind the store counter. Mr. Bell's twelve year old son, Bobbie Bell, was already behind the counter.

While appellant and his captives were behind the counter, a woman and two children entered the market.

Appellant concealed his gun and told his captives to act naturally and to wait on the customers. As soon as the customers left, appellant ordered Bobbie Bell to fill a bag with money from the cash register; Bobbie obeyed. Appellant then searched Smith and Bell, taking Smith's billfold.

At that moment, Charles House stepped into the market, and was ordered out by appellant; House obeyed. Almost immediately thereafter, appellant began shooting his captives. Bobbie Bell was shot first. Smith threw himself on top of Bobbie to protect him from further harm, and was himself shot in the throat and hand. Appellant then walked toward Bob Bell, who was on the floor behind the counter, pointed the gun at Bell's head and pulled the trigger. Fortunately, Bell threw up his hands and the bullet hit him in the wrist, breaking it. Appellant ran from the market.

Bell got a shotgun from under the store counter, preparatory to chasing appellant. He heard two gunshots outside the market. He looked toward the front of the store and saw appellant standing beside an automobile parked at the entrance. Bell chased after appellant. As he passed the automobile, he saw that a cab driver and his passenger had been shot. The passenger was later identified as Charles House, the customer who had entered the market only moments before appellant began shooting his captives and who was acquainted with appellant. Both the cab driver James E. Moore, and Mr. House died from a gunshot wound.

Appellant was arrested on July 6, 1980, as the result of information given police officers by Bell immediately after the robberies and murders. Subsequently, both Bell and Lewis Smith identified appellant as the perpetrator of the crimes and testified to that effect at the trial. Debra Ann Smith, the customer who came into the market with the children, also identified appellant and placed him behind the store counter with Bell, Bell's son, and Lewis Smith.

In addition to this eyewitness testimony, appellant was tied into the crimes by the testimony of Victor Davis, who had spent most of July 5, 1980, in company with the appellant. During the police investigation, Davis gave statements to the prosecution and to the defense that tended to provide an alibi for appellant. In essence, Davis said that he and appellant were together continuously from about 3:30 p.m. on July 5, 1980, until about midnight and that at no time did they go to Bell's Market. However, four days before the trial, and after his arrest for carrying a deadly weapon and for public drunkenness, Davis gave a statement to the prosecution, which incriminated appellant. In the trial Davis, who was promised immunity from prosecution in the Bell affair, testified in accord with his last statement.

According to Davis, he and appellant left Franklin, Tennessee, about 9:25 p.m. and arrived in Nashville in the vicinity of Bell's Market shortly before 10:00 p.m. Appellant then left Davis's automobile, after stating that he was going to rob Bell and was going to

try not to leave any witnesses.

Davis testified that he next saw appellant, some five minutes later, near appellant's father's house which was only a block or a block and a half from Bell's Market. At that time, appellant was carrying a sack and pistol. Appellant discarded the pistol as he got into Davis's automobile and said, "I didn't mean to shoot that boy." Davis retrieved the gun and sold it the next day for $40.00.

Davis further testified that after he picked up appellant, they went directly to appellant's father's house, arriving a little after 10:00 p.m. There, in the presence of Mr. Johnson, Sr., appellant took money from the sack, counted approximately $200.00, and gave $40.00 of it to Davis.

Appellant took the stand in his own behalf and denied being in the Bell Market on July 5, 1980. His testimony as to events of the day generally was in accord with Davis's testimony, except for the crucial minutes before 10:00 p.m. when witnesses placed appellant in Bell's Market. Appellant testified that he never left the Davis automobile on the trip from Franklin to his father's house in Nashville, and that he arrived at his father's house shortly before 10:00 p.m. Mr. Johnson, Sr., fixed the time of arrival of appellant at a few minutes before 10:00 p.m., by testifying that appellant arrived as a television program ended and the 10:00 p.m. news came on. Appellant's girl friend, who talked with appellant on the telephone while appellant was at his father's home, fixed the time as being ten

to fifteen minutes before 10:00 p.m. Appellant further testified that the money counted in the presence of his father was money he had won gambling in a street game in Franklin, Tennessee.

The jury accepted the prosecution evidence, including the identifications of appellant as the person who committed the robberies and murders, and found appellant guilty of murder in the first degree in killing Robert Bell III, James E. Moore, and Charles H. House, of assault with intent to commit murder in the first degree in the shooting of Lewis Smith and Robert Bell, Jr., and of the robbery of Smith and Bell.

The appellant does not specifically challenge the sufficiency of the convicting evidence, but does insist the prosecution was guilty of improprieties which had "a cumulative effect denying the [appellant's] right to a fair trial complying with due process and hindering the effectiveness of his counsel in preparing and conducting the defense." Under this general assignment, appellant insists the prosecution violated law and ethics in coverting the crucial alibi witness, Victor Davis, into a prosecution witness hostile to the defense.

The thread of appellant's argument throughout his brief of this assignment, and in his oral argument before this court, is that Davis was a "declared witness" for the defense; and that, having been so declared, the prosecution somehow was prohibited from questioning Davis and getting him to change his "story"--that, it was not fair to permit the defense to build an alibi

based on the initial statements given by Davis and then have the prosecution get Davis to change his story shortly before trial.

It is well settled that prospective witnesses are not partisans and do not belong to either party, but should be regarded as spokesmen for the facts as they see them. See Gammon v. State, 506 S.W.2d 188, 190 (Tenn. Crim. App. 1974). The purpose of an investigation and trial is to get to the truth. This sometimes entails the interrogation of witness on several occasions before truth is distilled in its purity. Neither party can have its investigation limited merely by a declaration that a witness will testify in behalf of the other party.

In addition to the general argument, appellant points to specific acts of the prosecution, which appellant insists were violative of both law and professional ethics. Appellant complains of the fact that the district attorney general caused Davis to be detained for questioning within a week of the trial date, the fact that Davis was questioned in the absence of his counsel, the time of day the questioning took place and Davis's physical condition, the fact that the prosecution made Davis aware of the possibility that the State would turn up evidence against Davis and move against him, and the ultimate grant of immunity to Davis from prosecution for crimes growing out of the Bell incident. Appellant argues that these actions by the district attorney general and his associates, violated Davis's Fourth, Fifth, and Sixth Amendment rights. We

see no basis for the argument, either in fact or law. First, we find nothing in the record to show a violation of Davis's constitutional rights. The evidence shows that Davis's detention was as the result of a lawful arrest on charges of public drunkenness and the unlawful possession of a deadly weapon. The record also shows that Davis knowingly and voluntarily waived his right to counsel when he learned that the interrogation would be limited to the Bell incident. On the Monday following the interrogation, Davis and his attorney went to the office of the district attorney general, where Davis repeated his statement in the presence of his counsel, had it reduced to writing, and signed it. Furthermore, when Davis testified in the trial, both parties were allowed to fully explore the circumstances of Davis's arrest and detention, the fact that Davis had changed his "story" from the one he had given earlier to the prosecution and the defense, and that the State had promised Davis immunity from prosecution for any crime predicated on the Bell incident. This exploration, of course, was crucial to the jury's evaluation of the credibility of Davis. Second, even if the law enforcement officials violated Davis's right to be secure in his person, his right not to be compelled to be a witness against himself, and his right to have counsel present during any interrogation, are these rights personal to to Davis and can only be asserted by him and not by some other person, such as appellant, who might be adversely affected by information elicited during the detention and interrogation. Cf. Brown v. United States, 411 U.S.

223, 230, 93 S. Ct. 1565, 1569, 36 L. Ed. 2d 208 (1973); United States v. Noble, 422 U.S. 255, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975); Faretta v. California, 422 U.S. 806, 816, 95 S. Ct. 2525, 2533-34, 45 L. Ed. 2d 563 (1975).

Appellant also charges that in the guise of questions and in closing argument, the prosecution made declarative statements calculated to bolster the credibility of Davis to the prejudice of the appellant. With thses charges in mind, we have re-read those parts of the record cited by appellant and find no basis for the charge.

Appellant also takes issue with the fact that, in questioning Davis, the prosecution brought out the fact that Davis had been granted immunity from prosecution in exchange for testimony relative to the Bell incident. Appellant argues that this was misleading in that the prosecution had not taken procedural steps to insure that Davis had immunity. Appellant does not indicate how he could be prejudiced by the action of the prosecution, nor can we see any basis for prejudice resulting from the statement that Davis had been granted immunity. Such a fact could serve only to diminish Davis's credibility in the eyes of the jury to the advantage of appellant. Furthermore, appellant's insurmountable problem in this case was not Davis's testimony, but the testimony of the three eyewitnesses, two of whom looked into the barrel of the pistol held by appellant and were shot by him.

Appellant further insists that the prosecution improperly withheld notice to the defense of the exis-

tence of the witness, Debra Ann Smith, until eleven days before the trial began. Interestingly enough, no complaint was directed to the prosecution's action, or rather inaction, until the motion for new trial was filed in behalf of appellant. This probably was due to the fact that the prosecution gave notice that Debra Ann Smith would be a witness within the minimum time requirement set forth in Rule 12.1 (b) of the TENNESSEE RULES OF CRIMINAL PROCEDURE. But whatever the reason, we now find nothing in the record to indicate that the time of notification hindered counsel's preparation for trial or his ability to adequately represent his client in the trial.

Appellant also takes issue with the time frame for the crimes set forth in the motion by the prosecution to require appellant to give notice of his intention to offer a defense or alibi. The time frame for the crimes set forth in the motion was "July 5, 1980, between 10:00 p.m. and 10:10 p.m." On trial, the proof indicated that the crimes were likely committed between 9:55 p.m. and 10:00 p.m. Appellant insists that he was prejudiced by the five to ten minute time differential. How he was prejudiced is not clear, since appellant did not limit his alibi evidence to the ten minute period set forth in the motion. but covered the period from 9:00 a.m. on July 5, 1980, until the following morning. This testimony necessarily would be the same for both time frames, and no prejudice could result from a five to ten minute differential between the time frame for the crimes set forth in the motion and the time frame proven by the

several witnesses who testified.

In a general assignment of error directed to the sentencing hearing, appellant insists that evidentiary rulings by the trial court, "constitute error, deprive the jury of guidance needed to evaluate the [appellant's] mitigating circumstances, and result in an arbitrary and capricious sentence of death." In the course of discussion of this assignment, appellant insists that the trial court erred in excluding testimony of expert witnesses on the validity of the death penalty as a deterrent to crime, the moral and ethical standards of conduct of western civilization, and the relationship between youth and accountability for decision making. The experts were to testify on these issues generally, since neither of them had ever seen or spoken with the appellant, or had reviewed his record.

In this state, the legislature has provided that where it is found that the defendant is guilty of first degree murder, a second proceeding is to be held before the same jury to determine the sentence--either life imprisonment or death--to be imposed T.C.A. § 39-2404 (a). The jury may impose the death penalty only upon finding that one or more aggravating circumstances, listed in the statute, are present, and further that such circumstance or circumstances are not outweighed by any mitigating circumstance. T.C.A. §§ 39-2404 (g) and (i). The burden of proof rests upon the state to establish the aggravating circumstances beyond a reasonable doubt and the jury must

specifically find that these outweigh any mitigating circumstances before they are justified in imposing the death penalty. T.C.A. § 39-2404 (f). These separate determinations must be put in writing and given to the trial judge along with the sentence of death, thus assuring that the jury has gone through the correct analysis in arriving at a death sentence. T.C.A. § 39-2404 (g).

In Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973 (1978), the Supreme Court points out that the:

> Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kinds of capital cases, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

The Court emphasized, however, in a footnote to this sentence that "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 98 S. Ct. at 2965 n. 12.

The legislature of this state has gone even further than is required by Lockett v. Ohio, supra, and has provided in T.C.A. § 39-2404 (c)

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated . . . below; and any evidence tending to establish or rebut any mitigating factors. Any such evi-

dence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence. (emphasis supplied)

The evidence tendered by the appellant and excluded by the trial court was not relevant to, nor did it have any probative value on the issue of punishment, but consisted of matters properly to be considered by the legislature in deciding whether the death penalty is ever a justified punishment for a person convicted of murder in the first degree and, if the circumstances under which the death penalty should be imposed. Cf. Houston v. State, 593 S.W. 2d 267 (Tenn. 1980), cert. denied, 101 S. Ct. 251, 66 L. Ed. 2d 117. The trial court thus correctly excluded the evidence.

In this case, with respect to each of three murders, the jury unanimouly found the following aggravating circumstance to exist:

> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. T. C. A. § 39-2404 (i) (6)

and, in addition with respect to the killing of Robert Bell, III, the jury found the following statutory aggravating circumstances:

> (3) The defendant knowingly created a great risk of death to two or more persons, other than the victims murdered during his act of murder. T.C.A. § 39-2404 (i) (3)
>
> (7) The murder was committed while the defendant was engaged in committing robbery. T.C.A. § 39-2404 (i) (7)

The jury also specifically found that there were no mitigating circumstances sufficiently substantial to

outweigh the statutory aggravating circumstances, and fixed appellant's sentence at death on each finding of murder in the first degree.

From our review of the record, we are of the opinion that the evidence proves appellant's guilt of the several crimes charged beyond a reasonable doubt. We are also of the opinion that the evidence supports the jury's imposition of the death penalty on its finding of aggravating circumstances listed in the Tennessee Death Penalty Act and the lack of any mitigating circumstance. Further, we are of the opinion that under the circumstances of this case, as shown by the evidence, the imposition of the death penalty by the jury was neither arbitrary nor excessive or disproportionate to the penalty imposed in similar cases.

Appellant sought to have the trial judge, in his instructions to the jury, inform the jury that evidence had been tendered to show that the death penalty has no deterrent effect upon crime and that the death of appellant would not benefit society or comply with moral and ethical standards of the day, and that the trial judge had excluded the evidence. Appellant insists it was error for the trial judge not to give the requested instruction since appellant's counsel had indicated to the jury in his opening statement that such evidence would be forthcoming. We see no merit in this insistence. The trial judge is under no duty to specifically note or explain his rulings on the admissibility of evidence, nor should he call

the jury's attention to evidence that has been excluded. The jury's responsibility is to decide the issues on the evidence submitted, not on what the appellant attempted to show.

Appellant takes issue with the action of the trial court in striking the affidavits of a juror and counsel for appellant, which were submitted to the court in support of appellant's motion for new trial. Appellant insists the affidavits reveal that the sentence of death in this case is the result of extraneous, prejudicial information and is the product of mistake and that appellant is entitled to a new sentencing hearing. On reading the affidavits, which were included in the record in this court, we are of the opinion that the action of the trial court was proper; and, in any event, the facts set forth in the affidavits do not show that the sentence of death was either the result of extraneous, prejudicial information, or was the product of mistake.

The substance of the juror's affidavit was that she did not understand that she could have voted for life; that she felt like she was locked in (on the death penalty); that she thought she would have to explain her vote to the judge if she voted for life; that she was afraid the judge would look at her and say, "Well, why did you do it?" that she was not afraid of the judge, but was afraid that she would be embarrassed. The juror further stated that she now believes, deep down in her heart, that Cecil Johnson did not commit the crimes.

It is settled law in this state that a juror can not impeach her verdict, and that a new trial will not be granted upon the affidavit of a juror that she misunderstood the instructions given the jury by the trial judge, provided the instructions were correct. Batchelor v. State, 213 Tenn. 646, 378 S.W.2d 751, 754 (1964); Norris v. State, 22 Tenn. 333 (1842). See also Montgomery v. State, 556 S.W.2d 559 (Tenn. Crim. App. 1977). The instructions in this case were complete and clear, the jury had the instructions before them as they deliberated, and, according to the affidavit, the juror in question read the instructions. She can not now impeach her verdict.

The affidavit of counsel for appellant was based on a telephone conversation he had with juror George B. Davis. When the contents of the affid were made public, Mr. Davis filed a statement with the court taking issue with parts of the affidavit and clarifying others. On motion, the trial judge struck both the affidavit and Mr. Davis's statement, which was in letter form. We agree with his action. The documents show no more than that the jurors understood the court's instructions and properly applied them to the evidence as they found it, despite a reluctance to impose a death sentence. Furthermore, there is nothing in the documents to indicate that the jury based its decision on any extraneous matter or outside prejudicial influence, as charged by appellant.

In a supplemental assignment of error, appellant questions the propriety of the trial court's

excusing three jurors for cause. Appellant insists that the trial court excluded these jurors on the basis of a statement of general opposition to the death penalty, and that this was in violation of the rule set forth in Witherspoon v. Illinois, 391 U.S. 510, 513-514, 88 S. Ct. 1770, 1772, 20 L. Ed. 2d 776 (1968), and followed by this court in State v. Harrington, 627 S.W.2d 345 (Tenn. 1981). Our view of the position taken by the jurors on voir dire examination differs from that of the appellant. As we read the record each of the jurors clearly indicated that he would not consider the death penalty under any circumstances and would automatically vote against its imposition, whatever the evidence and whatever the instructions of the trial court. The jurors having taken this stand, it was mandatory for the trial court to excuse them from service, if the jury were to be impartia

All assignments of error are overruled. T judgment of conviction in each case and the sentence imposed are affirmed. The death sentence will be carried out as provided by law on June 29, 1982, unless otherwise stayed or modified by appropriate authority. Costs are taxed to appellant.

R E Cooper

Robert E. Cooper, Justice

Concur:
Harbison, C.J.
Fones and
Drowota, JJ.

Dissenting in part and
Concurring in part:
Brock, J.

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,

Appellee,

v.

CECIL C. JOHNSON, JR.,

Appellant.

Davidson County Docket
No. 81-16-I

OPINION CONCURRING IN PART;
DISSENTING IN PART

For the reasons stated in my dissent in State v. Dicks, Tenn., 615 S.W.2d 126 (1981), I would hold that the death penalty is unconstitutional; but, I concur in all other respects.

Brock

BROCK, J.

APPENDIX B:

Order of the Supreme Court of Tennessee
Denying the Petition to Rehear

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,)
APPELLEE)
)
)
VS.) DAVIDSON CRIMINAL
)
)
CECIL C. JOHNSON, JR.,)
APPELLANT)

O R D E R

The petition to rehear filed on behalf of Cecil C. Johnson, Jr., is denied at cost of the petitioner.

This the 21st day of May, 1982.

R E Cooper

Robert E. Cooper, Justice

Concur:
Harbison, C.J.
Fones and
Drowota, JJ.

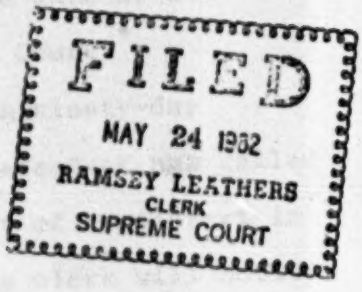
Dissent:
Brock, J.

APPENDIX C:

Order of the Supreme Court of Tennessee
Staying Execution Pending a Petition for Certiorari

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE



STATE OF TENNESSEE,)
APPELLEE)
)
)
VS.) DAVIDSON CRIMINAL
)
)
CECIL C. JOHNSON, JR.,)
APPELLANT)

STAY ORDER

Upon motion of the appellant-defendant, Cecil C. Johnson, he is hereby granted a stay of execution of the judgment of this court for a period of 90 days from May 21, 1982 pending the filing and disposition of a petition for the writ of certiorari in the Supreme Court of the United States, his conviction having been affirmed by the Supreme Court of Tennessee on May 3, 1982, and the petition to rehear denied on May 21, 1982.

A copy of the petition for certiorari will

be filed promptly with the clerk of this court, certified by counsel and showing the date of its filing in the United States Supreme Court.

At the conclusion of such ninety-day period, however, if the appellant-defendant has failed to perfect his petition for the writ of certiorari in the United States Supreme Court, the clerk will notify the Sheriff of Davidson County, the Honorable Lamar Alexander, Governor of the State of Tennessee, the Warden of the State Penitentiary, and the Clerk of the Criminal Court of Davidson County, Tennessee, that the judgment heretofore entered by this court will be carried out.

The clerk of this court will issue a duly certified copy of this order to the Clerk of the Criminal Court of Davidson County, Tennessee; to the Honorable Lamar Alexander, Governor of the State of Tennessee; to the Sheriff of Davidson County; and to the Warden of the Tennessee State Penitentiary.

ENTER this the 21st day of May, 1982.

R E Cooper

Robert E. Cooper, Justice

Sheriff & Wa

APPENDIX D:

Oral Remarks by the Trial Court upon the Motion for New Trial

IN THE CRIMINAL COURT OF DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

STATE OF TENNESSEE	)	Case No. C-6732A
	)	
VS	)	
	)	
CECIL C. JOHNSON, JR.,	)	

POST-TRIAL MOTIONS

APPEARANCES:

THE HONORABLE A. A. BIRCH, JR., PRESIDING JUDGE

FOR THE STATE:

Mr. Thomas A. Shriver
District Attorney General
Metropolitan Courthouse
Nashville, Tennessee 37201

Mr. Sterling Gray
Assistant District
Attorney General
Metropolitan Courthouse
Nashville, Tennessee 37201

Mr. Victor Johnson
Assistant District
Attorney General
Metropolitan Courthouse
Nashville, Tennessee 37201

MR. ENGLE: Yes, Your Honor.

(Whereupon oral argument was heard on the Motion for a New Trial.)

THE COURT: All right, gentlemen, of course I am going to think about this and to get to work on it right away. I expect maybe to have an order ready to enter sometime next week. I might say though that at this point I do find that the allegations of bad faith made by the defendant against the State have no, no support in the evidence at all and they are not supported. I also find that the defendant's lawyers have provided with a very, very excellent defense throughout and a defense which is consistent with the highest standards of the Nashville bar.

Is there anything further?

MR. JOHNSON: Nothing from the State if Your Honor please.

MR. ENGLE: No, Your Honor. I assume that we will also rely upon our pleadings on the motion for consecutive sentencing and our written answer thereto.

THE COURT: All right.

(COURT ADJOURNED)

----------END OF REQUESTED TRANSCRIPT----------

APPENDIX E:

Order of the Trial Court Denying the Motion for a New Trial

MINUTES, JANUARY TERM, 9TH DAY OF MARCH, 1981

MINUTE BOOK 17, PAGES 110 AND 111

C-6732A
ORDER
OVER-
RULING
MOTION
FOR
NEW TRIAL

STATE OF TEXAS

VS.

CECIL C. JOHNSON, JR.

ROB. W/DEADLY WEAPON, 2 CTS.,
MURDER 1ST DEG., 3 CTS., ASST. W/INT.
COM. MURDER 1ST DEG., 2 CTS.

ORDER

This cause came on to be heard upon the defendant's motion for new trial, testimony and evidence, statement of counsel, and upon the entire record. The Court finds as follows:

I a (1) - (4)

These matters address themselves primarily to the rights of Victor Davis. This witness testified and was cross-examined quite vigorously about his motives to tell the truth or swear a falsehood. The entire circumstances of his arrest, recantation, and his giving a written statement in his lawyer's presence were fully explored by the defendant on cross-examination.

The witness did not become a part of the "defense team" by virtue of his prior statement supporting the defendant's theory. He was fair game, and considering the totality of the circumstances and the magnitude of the case, the conduct of the District Attorney and his agents in obtaining Victor Davis' true statement was consistent with their sworn duty. Moreover, this Court doubts that the defendant has standing to complain of alleged violations of Victor Davis' rights.

MINUTES, JANUARY TERM, 9TH DAY OF MARCH, 1981

MINUTE BOOK 17, PAGES 110 AND 111

RDER
VER-
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OTION
OR
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STATE OF TENNESSEE

VS.

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I B (1) - (3)

Every trial Judge knows that in every case there are instances where lawyers engage in "side talk," ask open-ended questions, improper questions, questions in statement form, misleading questions, double negative questions, double entendre questions, and questions which could not possibly be within the witness' knowledge. This case is no exception, and both sides, in their zeal to advance their respective theories, have made statements, or proper statements made at inappropriate times. The Court believes that this is cured by instructing the Jury, as the Court did, that "statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence. If any statements were made that you believe are not supported by the evidence, you should disregard them."

I C

The comment made was improper. It mentioned matters not in evidence. However, its essence was mild and its thrust feeble. The statement did not attack the defendant in theory nor in person. The statement was neither inflammatory in content nor by delivery. The Court considered a curative instruction sua sponte, but decided against it for the following reasons:

A. No objection to the statement was made.

B. The Court did not know of defense counsel's plans with regard to a possible answer, and did not want to second-guess the defendant's trial strategy or deprive him of the right to rebut.

C. To have intervened sua sponte may well have compounded the effect of the statement by drawing attention to it and emphasizing it.

D. The District Attorney, in the Court's opinion, was acting in good faith.

The Court, at that point, viewed the proof against the defendant as being extremely strong and overwhelming in support of the defendant's guilt, and this Court, therefore, concludes that the improper statement had no effect on the verdict of the Jury, and in no way prejudiced the defendant or influenced the Jury. The Court also concl[illegible]t there are no errors in the record sufficiently significant [illegible] with the improper statement to produce a "cummulative effect."

I e, f

The Court finds that the matters alleged are mere inadvertences, and the record bears out the fact that no right of the defendant was prejudiced or diluted by the conduct complained of.

The Court concludes that the District Attorney General and his agents conducted both the investigation and the trial in a commendable manner, and in good faith as is inherent in his responsibility.

II

A. The Court ruled that the religious denomination, if any, and the political party affiliation, if any, of prospective jurors were matters beyond the scope of voir dire. The Court stands by this ruling.

MINUTES, JANUARY TERM, 9TH DAY OF MARCH, 1981

MINUTE BOOK 17, PAGES 111 AND 112

B. The Court ruled that it was improper to ask a potential juror to characterize himself as a "leader" or as a "follower." An answer to this question would tend to enhance or diminish a juror's concept of his duty. The Court stands by this ruling.

C. (5) The Court did, while conducting its preliminary voir dire, say, "The punishment for first degree murder is death, but the Jury may commute the punishment to life imprisonment." Four prospective jurors heard this, and when the matter was brought to the Court's attention, the Court corrected the statement, and admonished those four persons to disregard the prior statement. Only one of the four persons ultimately served on the panel.

In any event, the defendant exercised only a portion of his peremptory challenges, and had eight challenges remaining when jury selection was complete.

The Court is satisfied that the voir dire of the Jury was properly conducted and that the inquiries prohibited by the Court were as to matters which were not appropriate in the Court's opinion to inquire into. The Court extended to defense counsel wide latitude in their proper attempts to expose bias or prejudice. The Court is of the opinion that the Court's ruling on challenges for cause were entirely proper and correct.

III

A. The testimony was not relevant, and had no probative value on the issue of punishment.

B. The existence of the electric chair is not relevant to nor does it have any probative value on the issue of whether the death sentence was "real in law and fact." The jurors, from voir dire onward, and possibly before that, were certainly aware of the impact of their verdicts.

C. The tape recording was excluded from evidence because:

1. It was hearsay and the State was given no opportunity to rebut the matters contained therein.

2. The auditory quality of the recording was poor, and it could not be understood when played.

D. The Court excluded the testimony of the "ethicist" because he sought to give an opinion upon a subject which was within the grasp of ordinary men -- therefore, making the opinion unnecessary -- the Jury could navigate without it. Moreover, the opinion was not predicated upon any fact proved on the trial, nor was it based on any examination of or conversation with the defendant.

IV, V, VI, VII

The Court feels that the Jury was properly and adequately instructed in both phases of the trial.

VIII

Prior to the start of the trial, the Court advised defense counsel that they would be afforded ample time to examine Rule 16 statements. Further, the Court informed counsel that if at any time they needed additional time to examine this material, the Court would oblige. The Court declined to enter into any inflexible agreement regarding this matter.

IX

The Court has previously ruled on the admissibility of Debra Ann Smith's testimony. There has been no showing of prejudice suffer by disclosure of this witness' identity to the defendant eleven days prior to trial.

X

This aggravating circumstance was charged in the statutory language.

XI

From the proof, it appeared to the Court that the defense knew more about Victor Davis than did the State. In any event, the State advised the defendant of the particulars of the "last minute development" regarding Victor Davis promptly.

XIII

The question of bond has never been presented to this Court.

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XIV

Trial Exhibits 1, 2, 6, and 12 were relevant, had probative value on the issues involved, and were devoid of inherent prejudice and were in no way inflammatory.

This Court concludes, therefore, that this defendant was ably represented, that the evidence admitted was relevant and of probati value, that improper evidence was excluded, that a fair and impartia jury, correctly instructed, deliberated upon their verdict properly and reached such verdict based upon the law and the evidence as truth and justice dictated.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the defendant's motion for new trial be, and is hereby, and in all respects, overruled.

This the 9th day of March, 1981.

A. A. BIRCH, JR.
JUDGE

APPENDIX F:

Motion for a New Trial

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION III

FILED

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JOHN LASHLEE, CLERK

STATE OF TENNESSEE	)	
	)	
VS.	)	NO. C-6732A D.C.
	)	
CECIL C. JOHNSON, JR.	)	

MOTION FOR A NEW TRIAL

Comes the defendant and respectfully moves the Court to grant him a new trial upon the jury's determination of guilt on the 19th day of January, 1981, and/or upon the jury's sentence of death by electrocution on the 20th day of January, 1981. Tennessee Rules of Criminal Procedure 33. TCA §39-2404(k) (1980 Supp.).

In support of his motion, he would show as follows:

I. Improprieties in the conduct of the prosecution had a cumulative effect which denied the defendant his right to a fair trial conducted in compliance with due process requirements and which hindered the effectiveness of his counsel in preparing and presenting his defense. In specific terms, these improprieties included the following:

a. The prosecution transcended legal protections and ethical considerations in successfully obtaining the testimony, at trial during their case-in-chief, of the witness Victor Davis, whose evidence was self-acknowledged to be in complete contradiction to the numerous previous statements he had made to defense and prosecution investigators. These excessive violations included the following:

(1) Causing the illegal arrest and detention of Victor Davis, who was then under subpoena to trial as the defendant's principle alibi witness.

(2) Interrogating Victor Davis in the absence of his counsel (who the witness had retained in a seperate felony case in which his

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petition for probation was then pending), despite the suspect's repeated requests to speak with his counsel and his expressed intentions to remain silent until he was permitted such a consultation.

(3) Interrogating Victor Davis from shortly after midnight until approximately 4:00 AM, when the witness finally agreed to offer testimony helpful to the prosecution.

(4) Interrogating Victor Davis while the three(3) prosecutors present knew, or should have known, him to be intoxicated upon illegal drugs and alcohol.

(5) Threatening Victor Davis with incarceration for his conduct earlier that evening upon a charge of "suspicion of robbery" of a service station, which offense exists neither in law or fact, and

(6) Threatening Victor Davis with indictment upon the same murder, robbery and assault charges facing the defendant, should the witness persist in testifying for the defense in accord with his previous written statements of complete alibi.

b. The prosecution's direct examination of their witness Victor Davis was improperly conducted and, despite defense objections, the Assistant District Attorney General's questions included the following errors:

(1) Announcing, in the presence of the jury, various matters not of previous record by making declarative statements in the purported context of leading questions, without a foundation, such as "you knew that I'd been looking for you, didn't you"; "what did I tell you"; "what did I promise you"; and "now you've been promised immunity for your testimony, haven't you."*

(2) Offering an opinion upon the veracity and credibility of the witness by uttering the purported question "until after you'd told me the truth, had I promised you immunity.", and

(3) Testifying, in the context of a purported question, as to an alleged grant of "immunity" to the witness when, as a matter of law, immunity had not been granted as the prosecutor had not moved the Court to grant immunity and the witness had not previously refused to testify before the Grand Jury

*As the trial transcript is not yet available, all references to specific remarks made during the course of the trial are paraphrased from defense counsel's memory and trial notes.

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about an offense in relation to which he had been ordered to testify, wherefore the Assistant District Attorney General's improper allegation of the existence of immunity legally constituted only an oral promise that he would not prosecute the cooperating witness although the Jury was misled to believe that the witness had earned legal protections.

c. During the defense direct examination of their expert penalty-phase witness, Dr. Les Hutchinson, the Attorney General rose for the apparent purpose of entering an objection to a question, but instead remarked "Your Honor, counsel knows that's improper" when the defense attorney was properly tendering questions in accord with the Court's previous procedural rulings; which comment by the prosecutor was improper, was unnecessary, implied that defense counsel was intentionally violating his ethical obligations as an attorney, implied that defense counsel was intentionally violating an evidentiary ruling of the Court which had been made while the Jury was sequestered, and disparaged the defendant's attorney in the presence of the Jury.

d. The Attorney General made improper and inflammatory comment during his closing argument upon the guilt-innocence phase when he advised the Jury that he had a special reason for being interested in this particular prosecution and a personal interest in its outcome, and then told the Jury that the prosecutor's daughter had attended a neighborhood elementary school with the twelve (12)-year old murder victim, asserting that the two (2) children had played together before the minor's death, which relationship was not in evidence.

e. Although the prosecutors had obtained a written statement from their witness Debra Smith on the 15th day of July, 1980, the prosecution failed to disclose the existence or identity of the alleged eyewitness until the 2nd day of January, 1981 (eleven (11) days before the start of this trial), even though they had filed a September, 1980 answer to the defendant's request for discovery which alleged that all of the State's witnesses were listed upon the indictment, which delay and concealment hampered the defendant's last-minute preparations for trial and hindered the defendant's ability to effectively investigate the crucial eyewitness before undertaking her cross-examination.

f. Having filed a Motion for Notice of Intent to Rely upon an Alibi Defense, having specified therein that the alleged crime occured between the hours of 10:00 PM and 10:05 PM, and having received the defendant's November 17th Answer affirming an intention to rely upon an alibi and setting forth the defendant's whereabouts during the times alleged by the State, the prosecution refuted their own prior declaration at trial and introduced the testimony of seven (7) witnesses during their case-in-chief*, each of whom gave evidence that the crime was completed before

*These seven(7) witnesses are Louis Smith ("shortly after 9:30 PM"), Bob Bell ("between 9:30 and 10:00 PM, probably about 9:40 PM"), Metro Police Officer Wesley Carter ("received a radio call at 10:00 PM reporting the incident had already ended and arrived at the scene at 10:04 PM"), Medical Examiner Dr. Ashurst ("estimates the time of the victim Moore's death at 9:30 PM"), Adera Hereford ("9:55 PM and before 10:00 PM"), Walter Davis ("9:55 PM") and Amanda Perry ("it wasn't 10:00 PM yet").

10:00 PM, which variance between their prior written notice and proof at trial substantially prejudiced the alibi defense which presented unimpeached evidence of the defendant's whereabouts elsewhere at the designated hour of 10:00 PM and which variance significantly impaired the defendant's ability to contradict this surprising evidence as the police tape recordings reflecting the actual time of the first relevant complaint call had been mysteriously erased despite agreement that they be preserved.

II. The nature of the voir dire examination of the jury and the limitation upon the scope of the defendant's inquiries into the potential juror's qualifications prevented the defendant from intelligently selecting those who would sit in his judgment and deprived the defendant of his right to a fair trial. These errors included the following:

a. The defendant was denied the opportunity to inquire into the potential jurors' religious denomination and political affiliations, even though such voluntary associations are acknowledged to have a significant and predictable correlation to the juror's attitudes concerning the imposition of the death penalty.

b. The defendant's attorneys were prohibited from inquiring if the prospective jurors had preconceptions of their potential obligations as to any perceived civic duty to convict persons on trial, as to whether they would consider themselves to be leaders or followers, and if they could properly presume that a sentence of life imprisonment meant that the defendant would be imprisoned for life while a sentence of death meant that the defendant would be electrocuted until dead.

c. Upon motion by the State and inquiry by the Court without an opportunity for the defendant to attempt rehabilitation of challenged prospective jurors or to attempt clarification of their legal and ethical positions, several prospective jurors were excused for cause. Defendant alleges that such excuse and disqualification was reversible error owing to the following considerations:

(1). The defense was deprived of an opportunity to demonstrate the juror's competence and qualification despite their apparent confusion and possible misunderstanding of the questions addressed in the State's examination and during the Court's inquiry.

(2). The defendant was thereby deprived of jury composed of a legitimate and fair cross-section of the community, which would inherently include persons stating an initial opposition to the death penalty.

(3). The exclusion of these prospective jurors who stated a reluctance to impose the death penalty resulted in the limitation of the panel to those persons who were prone to conviction of the defendant upon the guilt-innocence phase and the qualifying questions improperly directed the juror's attention to the issue of punishment in a premature neglect of the presumption of innocence.

(4). When several prospective jurors stated under oath that their moral, social and ideological opposition to the death penalty would not lead them to ignore the law as instructed by the Court or to violate their oath as jurors should they reach that issue of punishment, their excuse for cause improperly deprived the defendant of a fair trial.

(5). During the Court's qualification of the first (1st) four (4) prospective jurors, they were erroneously instructed that the punishment for murder in the first degree was death "which the jury may commute to life imprisonment" and, although the Court issued correcting instructions to disregard this premise, the clarification before the entire prospective panel did not remove this taint and only introduced and reinforced the misconception before other jurors too numerous to be excused by the defendant's remaining peremptory challenges.

III. During the trial of the penalty-phase, the defendant's attempts to introduce proof in support of his allegation of the existence

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of non-statutory mitigating circumstances was severly limited or prohibited by the Court's evidentiary rulings, which restrictions were erroneous in the following manners:

a. The testimony was relevant and probative of the defendant's statutory and alleged non-statutory mitigating circumstances in support of a verdict of life imprisonment.

b. The exclusion of the eyewitness testimony by a stipulated expert in criminal-defense law as to the appearance of the electric chair, with tender of an appended photograph in exhibit, and its adjacent premises prevented the defendant from establishing the State's affirmative compliance with the statutes pertinent to the maintainence of such facilities, prohibited the defense from proving that a prospective sentence of death was real in law and fact, and denied the jurors an opportunity to learn of the actual impact of their prospective judgment.

c. The defendant should have been permitted to introduce a tape recording of the penalty-phase opinion of the wife of one of the victims, which witness had been an original prosecutor upon the indictment.

d. After the testimony without the presence of the jury of an expert in criminal defense law who opined that the most significant, evidentiary factors in obtaining a verdict of life imprisonment after conviction of murder in the first degree were proof of the absence of a deterent effect in imposition of the death penalty and defense testimony concerning the religious and moral considerations relevant to the jury's deliberations, the defense should have been permitted to introduce such available

testimony after their good-faith announcement during opening argument that it would be forthcoming as such evidence was, in the expert's opinion, relevant and as several prospective jurors had stated that they believed the death penalty to be significant to religious and moral considerations and/or to possess an inherent deferent impact.

IV. The denial of certain special instructions requested by the defense in reliance upon reported law and the facts in the case at bar denied the defendant a fair trial through errors which included the following:

a. Identification of the defendant as the alleged perpetrator came into issue during cross-examination of the State's purported eyewitness and was magnified by the defendant's reliance upon an alibi defense, but the defendant's request for a special instruction predicated upon Sloan et al. was denied in favor of the pattern instruction which fails to give the Jury adequate guidance in the evaluation of identification testimony.

b. The Court refused to modify the pattern instruction by inclusion of an expanded definition of the defense of alibi, which extension had been suggested by the Tennessee Court of Criminal Appeals.

c. Although the State's evidence clearly showed that the alleged crime was a murder committed during the conduct of a robbery, the Court refused to instruct the Jury, as requested, upon felony-murder and, improperly held that the prosecutor was entitled to elect under which

of the two (2) varieties of common-law murder they would proceed, even though the Court subsequently and inconsistently instructed the Jury that they could find a statutory aggravating circumstance if the murder was committed during a robbery.

d. Although the Assistant District Attorney General had misused the term "immunity" during his improper examination of the witness Victor Davis (see I. b (3) above), the Court refused three (3) special requests for instructions which defined the legal concept and its impact, described its proper legal invocation, and set forth its relevance in considering the impeachment of a witness, with the result that the prosecutor's erroneous statement of law was left uncorrected and the Jury was forced to speculate upon the legal significance of the term.

e. The Court should have granted the special requests to instruct that a verdict of life imprisonment could be returned even if an aggravating circumstance was found, that mitigating factors need not outweigh aggravating circumstances to return a verdict of life imprisonment, and that the Jury could reject the death penalty even if they failed to find a single mitigating circumstance.

f. After excluding the defendant's penalty-phase proof as to the existence of non-statutory mitigating circumstances despite defense counsel's good-faith assertion during opening statement of intent to prove such factors, the Court should

have granted special requests to the effect that they were not to consider whether the death penalty had any deterent effect upon crime and that counsel's announcement of intent to prove these non-statutory mitigating circumstances should be disregarded as a matter of law which could not enter into their deliberations.

V. As the State's proof clearly established that the alleged offense was a murder committed during the perpetration of a felonious robbery, although the Court refused to so instruct the Jury, the convictions of murder (third, fourth and fifth counts of the indictment) merged with the convictions of robbery accomplished with the use of a deadly weapon (first and second counts of the robbery) under the felony-murder rule and it was error to convict the defendant upon both offenses. In the alternative, if the Court is of the opinion that premeditated murder was proven without imposition of the common-law felony-murder doctrine, then it was error to instruct the Jury that they could find felony-murder as a statutory aggravating circumstance. Defendant asserts that assault with intent to commit first degree murder (sixth and seventh counts of the indictment) also constitutes a felony which merged by legal operation of the felony-murder rule or, during the penalty-phase, merged with both the instructed aggravating circumstances of risk to two (2) or more persons (#3) and avoiding prosecution (#6).

VI. By mandatory joinder of three (3) counts of murder in the first degree (count numbers 3, 4 and 5), the State is not entitled, upon conviction, to a de facto finding of the aggravating circumstance that the incident presented risk to

two (2) or more persons (§§ 3), wherein the Jury could consider each conviction for murder seperately and conclude that the other two (2) murder convictions automatically established the aggravating circumstance, and the Jury should have been instructed that they were not to consider other joined murder charges in evaluating a risk to two (2) or more persons.

VII. It was inherently inconsistent for the Jury, under these facts, to conclude in penalty judgment upon the third (3rd) count of the indictment wherein the child, Bob Bell III, was the victim that the defendant qualified for death under three (3) aggravating circumstances (to wit: #3 - risk, #6 - avoiding prosecution, and #7 - robbery) and to simultaneously conclude upon the fourth (4th) and fifth (5th) counts that the defendant's alleged crime was aggravated by only one (1) circumstance (to wit: #6 - avoiding prosecution).

VIII. The defense was hampered and prejudiced by the Court's denial of the defendant's pretrial motion to establish rational and consistent procedures for the expedient exchange of the prior written statements of the adversary's witnesses (i.e. Little Jencks' Act materials), which adverse ruling came to be of critical impact when the prosecution passed frequently voluminous materials to defense counsel at the immediate close of direct examination and the Jury was either sent out for brief recess (in possible implication that the defendant's attorneys had not properly prepared for their cross-examination) or, on occasions, remained in the courtroom while silence surrounded counsel's race through the extensive documents and making of quick contrasts with prior investigative reports before jumping to their feet to begin the witness' cross-examination.

IX. The testimony of the State witness Debra Smith, who testified during their case-in-chief, should have been excluded due to

impermissible taints upon her in-court identification, such as multiple exposure to the defendant's image in the media and the exhibit of a photo of the defendant to the witness in the prosecutor's office immediately prior to her first appearance in court upon a motion to surpress, and due to the State's failure to make timely disclosure of the existence of the witness, who was known to them by written statement on July 15th but not revealed until January 2nd ----- eleven (11) days before trial was to begin.

X. The alleged aggravating circumstance (#6 - that "the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant") was instructed over the defendant's objection and should have been excluded as overly broad, vague, and not supported by the facts introduced into evidence.

XI. The State failed to comply, as promised in writing, with Rule 12.1 (B) in that they failed to advise the defendant of the existence of a witness (to wit: Victor Davis) who they intended to rely upon to refute the defendant's claim of alibi until the day before trial (i.e. January 12th) even though the Rule requires that such witnesses be identified at least ten (10) days prior to trial, wherefore the witness should not have been permitted to testify during their case-in-chief especially since the defendant had filed a motion to exclude such undisclosed testimony on January 6th.

XII. The verdict of the Jury did not conform to the evidence presented at trial in the following manners:

a. The judgment of the Jury is contrary to the weight and preponderance of the evidence.

b. The judgment of guilt by the Jury is not supported by substantial evidence sufficient to justify such a finding.

III.

c. The Jury's finding of the absence of any sufficiently mitigating circumstances is not supported by the evidence.

XIII. The defendant was substantially prejudiced and deprived of a fair trial by reason of the denial of bond to permit his pretrial release.

XIV. Although not the subject of contemporaneous objection by defense counsel, defendant avers that it was plain error to permit the prosecution to introduce antiquated photographs of the victims, (trial exhibits #1, #2 and #6) and to exhibit to the Jury photos of the victims in the taxicab (trial exhibit #12 - collective), which items had no probative value or relevance and were intended only to prejudice and inflame the Jury.

XV. As the State has filed a motion for consecutive sentencing, which matter will not be heard until after the date upon which this Motion for a New Trial is due to be filed, the defendant respectfully reserves the right to assert as error upon appeal any future adverse judgment of this Court upon the subject of sentencing.

Defendant reserves the right to submit affidavits in support of the allegations herein.

WHEREFORE, premises considered, defendant alleged that these errors, either singular or in cumulative effect, mandate a new trial upon these issues and respectfully moves the Court either to grant a new trial upon the issue of guilt or innocence, or to order a new trial upon the issue of the appropriate penalty.

Respectfully submitted,

J. Michael Engle

Robert L. Smith

Robert L. Smith
Attorneys for the defendant

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I certify that a copy of this motion was delivered by my own hand tc the Office of the District Attorney General for the Tenth Judicial District of the State of Tennessee, addressed to Thomas Shriver, on this 19th day of February, 1981.

J. Michael Engle

cc: Cecil C. Johnson, Jr.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CECIL C. JOHNSON, JR.
Petitioner,

V.

STATE OF TENNESSEE,
Respondent.

NO. 82 5088

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Petitioner, Cecil C. Johnson, Jr., by his undersigned counsel, asks leave to file the attached Petition for a Writ of Certiorari to the Tennessee Supreme Court without prepayment of costs or security therefor and to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States. Petitioner's affidavit of indigency in support of this motion is attached hereto.

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ROBERT L. SMITH
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ATTORNEYS FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CECIL C. JOHNSON, JR.
Petitioner,

V.

STATE OF TENNESSEE,
Respondent.

NO. _____

AFFIDAVIT

I, CECIL C. JOHNSON, JR., being first duly sworn according to law, make oath as follows:

1. I am the petitioner in the above-entitled case.

2. I have been incarcerated without bond since July 6, 1980. Prior to that time, I was employed, but have no wages still owing to me. I do not have a checking account, a savings account or any demand deposits payable to my name. I do not own real property and do not have a car.

3. That by order of the Judge of the Criminal Court for Davidson County, Tennessee, Division III, dated 21 November 1980, I was declared an indigent person unable to pay the expenses necessary for my defense in the trial court.

4. That I was allowed to perfect my direct appeal to the Supreme Court of Tennessee as an indigent without payment of costs or security therefor.

5. Because of my poverty I am unable to pay the costs of the above cause.

6. I am unable to give security for said cause.

7. I believe that I am entitled to the redress I seek in this cause.

AFFIANT SAITH FURTHER NOT.

CECIL C. JOHNSON, JR.

SWORN to and subscribed before me this 17th day of July, 1982.

NOTARY PUBLIC

My commission expires 8-11-84